

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000651-001 DT

01/10/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

K. Waldner

Deputy

JOHN VINSON
TEEN OUTREACH ACADEMY

JOHN VINSON
310 W MCNEIL ST
PHOENIX AZ 85041
TEEN OUTREACH ACADEMY
310 W MCNEIL ST
PHOENIX AZ 85041

v.

ANNA GAMBLE (001)
BEGIN TO DREAM (001)

ANNA GAMBLE
5518 S 14TH PL
PHOENIX AZ 85040
BEGIN TO DREAM
5518 S 14TH PL
PHOENIX AZ 85040

REMAND DESK-LCA-CCC
SOUTH MOUNTAIN JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011069423

Defendant Appellant Anna Gamble/Begin to Dream (Defendant) appeals the South Mountain Justice Court's determination (1) awarding Plaintiffs John Vinson/Teen Outreach Academy a forcible detainer and (2) signing a restitution order allowing Plaintiff access to the property. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On April 11, 2011, Plaintiff filed a Complaint for a residential eviction action claiming Defendants defaulted on their obligation to pay rent and alleging the rent had been unpaid since September 1, 2010. The Complaint alleged the required written notice was served on Defendant on March 3, 2011, by posting the documents on the door and mailing a copy to Defendants by certified mail. A second AOS indicates Defendants were re-served with the summons, complaint in forcible detainer, and a 5-day written notice alleging Defendant failed to pay rent on April 13, 2011. Plaintiffs alleged Defendant owed past due rent of \$9,600.00 plus late fees of \$25.00 per

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month for each month the rent was not paid in full. The April 13, 2011, affidavit of service indicates that the process server—after attempting personal service—posted a copy of the documents on the front of the dwelling and sent a second copy by certified mail return receipt requested as well as a third copy mailed by first class mail.

The trial court held a trial on the forcible detainer April 19, 2011.¹ At trial, the Defendant agreed the monthly rental was \$1,300.00 per month.² She testified she failed to pay rent for the months of September, 2010, through April, 2011, or a total of eight months.³ Plaintiff requested \$9,600 in back rent. Plaintiff did not request late charges or rent for March or April.⁴ Defendant stated her case was unusual because she had a lease with option to purchase.⁵ She said the parties had an agreement she could stay there until the loan modification occurred.⁶ The trial court advised Defendant the law only allowed 30 days and commented Plaintiff had prior dismissed actions which gave Defendant notice of the potential eviction at least 60 days earlier.⁷ Defendant asserted she had a written agreement “according to our minutes” that she could stay until the modification was complete.⁸ Defendant maintained the parties had an earlier proceeding where the trial court heard her witness—Vera Fine—testify that Defendant could remain at the property.⁹ The trial court commented that Defendant’s witness’ testimony was not the reason the prior case was dismissed.¹⁰ Instead, the trial court stated it dismissed the prior proceeding because of a service problem¹¹ and not because of an agreement between the parties.¹² In the prior action, the trial court never ruled on whether there was a verbal or written contract that superseded the lease agreement. The trial court stated there was never any expectation that Defendant could use the property for free while Plaintiff was going through a modification.¹³ The trial court found there was no payment of rent during the prior months, although previous testimony indicated (1) the Defendant believed she was entitled to use the property without paying rent for eight months while (2) the Plaintiff believed there was an expectation Defendant would pay the rent.¹⁴ The trial court then instructed the parties that the Landlord Tenant Act gives a landlord the ability to get immediate possession if rent is not paid.¹⁵ The trial court found Defendant made no

¹ Trial transcript, April 19, 2011, bench trial.

² *Id.* at 1:35:36.

³ *Id.* at 1:35:41–1:36:08.

⁴ *Id.* at 1:36:47.

⁵ *Id.* at 1:37:16.

⁶ *Id.* at 1:37:48.

⁷ *Id.* at 1:40:08.

⁸ *Id.* at 1:40:34.

⁹ *Id.* at 1:40:44.

¹⁰ *Id.* at 1:40:56–1:41:00.

¹¹ *Id.* at 1:42:26.

¹² *Id.* at 1:41:08.

¹³ *Id.* at 1:41:30–1:41:48.

¹⁴ *Id.* at 1:42:26–1:44:09.

¹⁵ *Id.* at 1:45:48–1:48:57.

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payment since September of the prior year. The trial court then awarded Plaintiff his requested \$9,600.00 although the trial court calculated the damages to be \$10,400.00.¹⁶ The trial court concluded by advising Defendant how to appeal.¹⁷

The trial court held a second trial on restitution on June 16, 2011.¹⁸ At this trial the trial court said the bankruptcy issue had “no impact on restitution and giving back the property”¹⁹. After the parties indicated there was no pending bankruptcy, the trial court signed the writ of restitution.²⁰ The trial court advised Defendant she needed to remove her personal items as Plaintiff could now have the constable forcibly remove her from the property.²¹

Defendant then alleged Plaintiff no longer owned the property.²² In contrast, Plaintiff affirmed he owned the property.²³ Defendant said she (1) signed a lease agreement; (2) was in the process of purchasing the land; and (3) provided a copy of the lease and the phone number for the property manager she was dealing with. The trial court attempted to contact this property manager by phone—from the courtroom²⁴—to ask what that party’s relationship was with the property. After leaving a message, the trial court announced that as of this proceeding, the trial court would be issuing a writ of restitution.²⁵ The trial court then stated that if Defendant owned the property,²⁶ she would have the right to it after she evicted Plaintiff.

Plaintiff queried about whether the Defendant owed the debt in her own name. The trial court explained the difference between a corporation and a sole proprietorship.²⁷ The trial court then said it had not seen any documentation indicating the Defendant was a corporation.²⁸

Defendant filed a timely notice of appeal on April 25, 2011, and a memorandum on August 15, 2011. Plaintiff failed to file a responsive memorandum although Plaintiff filed a one page document requesting a hearing to “provide information toward this case.” This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

¹⁶ *Id.* at 1:46:42–1:47:09.

¹⁷ *Id.* at 1:47:47.

¹⁸ According to Appellant’s memorandum, there was an earlier trial on April 19, 2011, but this Court has no documents from that earlier trial and no transcript of those proceedings.

¹⁹ Trial Transcript of June, 16, 2011, bench trial, at 3:31:30.

²⁰ *Id.* at 3:31:42.

²¹ *Id.* at 3:31:42–3:32:01.

²² *Id.* at 3:32:05–3:32:56.

²³ *Id.* at 2:33:08.

²⁴ *Id.* at 3:36:46–3:38: 21.

²⁵ *Id.* at 3:38:37.

²⁶ Defendant provided no other proof of her purchase and had no witnesses to attest to this purchase.

²⁷ Trial Transcript, June 16, 2011, *id.* at 3:41:07–3:41:52.

²⁸ *Id.* at 3:41:59.

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II. ISSUES:

A. Did the Appellant Properly Present Her Issues On Appeal.

Defendant submits an appeal challenging the sufficiency of the evidence, but does not properly reference the record. Therefore, Appellant's appellate memorandum fails to comply with Rule 8(a)(3), Super. Ct. R. App. P.—Civil, which states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

It is not enough to merely mention an argument. Briefs must present significant arguments supported by authority²⁹ that set forth the appellant's position on the issues raised. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Furthermore, unless there is fundamental error, allegations that lack specificity or reference to the record do not warrant consideration on appeal. *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977). Fundamental error rarely exists in civil cases. *See Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37, ¶ 23 (App. 2005). *See also Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (doctrine of fundamental error in civil cases may be limited to those instances when a party was deprived of a constitutional right).

Defendant failed to apprise this Court of the specific facts that support her conclusion. She apparently relied on a lease provision but she failed to properly raise this argument at either the April 19, 2011, or June 16, 2011, trials. From the audio recording of the April 19, 2011, trial, this Court believes Defendant may have raised this claim at some earlier proceeding under a different case number.³⁰ However, Defendant failed to include a copy of any audio or written transcript for any other hearing. Absent that information, this Court has no basis on which to rule about any lease provisions or what the parties meant by the language in any lease provision as the lease was not introduced at either the April 19, 2011, or June 16, 2011, trials.

Defendant also referred to three exhibits—A, B, and C—in her appellate memorandum. She never introduced these exhibits at either the April or June trial. Because the referenced exhibits were not introduced into evidence, this Court must disregard the exhibits.

²⁹ Defendant cited two cases in her memorandum. Neither case provides precedent for this matter and Defendant's reference to *Autonumerics, Inc. v. Beyer Industries, Inc.* 144 Ariz. 181, 696 P.2d 1330 (Ct. App. 1984) and *Sturm v. Boker*, 150 U.S. 312, 14 S. Ct. 99 (1893) are inapposite. *Autonumeric, id.*, dealt with an installment contract while *Sturm, id.*, was a case involving the sale of goods. Neither case referred to a lease agreement or a forcible detainer action. In citing these cases, Defendant failed to show how the case applied to the current situation.

³⁰ Defendant refers to a February 24, 2011 hearing in case CC20110344837 in her appellate memorandum. This Court lacks any information about this prior case and has no documents and no transcript of any hearing in CC20110344837. Therefore, this Court must disregard any allegation stemming from any hearing or document in CC20110344837.

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B. Did The Trial Court Abuse Its Discretion By Granting Plaintiff A Forcible Detainer And Later Ordering Defendant To Vacate The Property.

As stated above, Defendant did not submit proof of her claim. The transcript of the proceedings in this case number lacks evidence about what occurred. The evidence at the April 16, 2011, trial is limited to a single reference about a witness—Vera Fine—at some prior proceeding for which this court has no audio or written transcript. This Court does not know what the witness said. The remainder of the evidence is Defendant’s testimony that she is not responsible for the rent. This was contradicted by Plaintiff’s assertion that Defendant did have this responsibility.

Defendant attempted to introduce—for the first time on appeal in this case—the “Lease With Purchase Option” to support her claim she owed Plaintiff no rent. She apparently believes this because the photocopy of the lease has a handwritten clause stating all rent would be refunded if the property is foreclosed.³¹ There is no showing this document was provided to the trial court at the April 19, 2011, proceeding. Furthermore, even if the document had been provided, there is no showing Defendant provided the necessary foundation to demonstrate its authenticity. Although Defendant mentions “the lease was recorded in the official records of the Maricopa County Recorder on October 2, 2009.” Defendant did not provide either the trial court or this Court with a certified copy of the lease. Thus, the lease is not self-authenticating. Ariz. R. Evid., Rule 902 (4). In addition, Defendant did not provide any authentication for her copy of this document. This Court notes the provided documents are all photocopies. There was no testimony establishing the provided documents reflect what they purport to reflect or that they are true and accurate copies.

Even if this Court were to assume the “Lease With Purchase Option” was properly introduced—an assumption this Court does not make—the agreement itself does not necessarily support Defendant’s position. There are several handwritten changes to the lease. Some of these changes are initialed while others are not. For example, Provision 7 of this agreement is crossed out and the following phrase was handwritten: “At discreion [sic] of lessee and lessor.” The initials JV and AG appear next to these words. In contrast, there are no initials near the handwritten provision³² stating:

In the event this property is foreclosed upon during the period of this lease agreement, meaning (reposed [sic] by Lender or Bank) all monies paid to Lessor is to be refunded to Lessee.

This is the paragraph which forms the source for Defendant’s claim. Because (1) this handwritten paragraph is not initialed; (2) there is no authentication for the document; and (3) the

³¹ This Court does not know if Defendant attempted to introduce this document in the prior, related proceeding.

³² Provision 21 of the same “Lease With Purchase Option” has handwritten words adding “can paint inside of house” followed by the initials of AG and what appears to be JV.

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document was not introduced into evidence, this Court cannot consider the document in determining if the trial court abused its discretion in finding Defendant guilty of a forcible detainer.

This court—as the appellate court—does not re-weigh the evidence to determine if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Instead, this court must find if the Plaintiff presented sufficient evidence to the trial court to support the trial court’s decision—*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684 ¶ 16 (2009)—and prove the Defendant failed to pay the mandated rent. Defendant admitted she did not pay the rent for eight months. Defendant’s admission provided the trial court with the necessary proof for the trial court’s determination.

In determining if the trial court abused its discretion, this court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–29, 697 P.2d 1073, 1078–79 (1985) (citations omitted). Thus, a trial court abuses its discretion if it makes decisions unsupported by facts or sound legal policy. Here, the trial court was presented with conflicting statements about the requirement for rent. Plaintiff asserted Defendant owed the rent while Defendant maintained her obligation to pay rent ended once the home went into foreclosure. The trial court has the responsibility of evaluating these contradictory claims. This is a question of the sufficiency of the evidence.

In addressing the question of sufficiency of the evidence, the Arizona Supreme Court said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

State v. Bearup, id., 221 Ariz. at ¶ 16, 211 P.3d at ¶ 16 (citations omitted). Here the evidence is conflicting. The Arizona Supreme Court said the following about the trial court’s discretionary role in reviewing evidence and testimony:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will

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not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this case involved an “assessment of conflicting procedural, factual or equitable considerations which vary from case to case,” this Court will not second-guess the trial court’s factual determination that Defendant was guilty of a forcible detainer when she continued to use the property without paying the rent.

Forcible detainer actions are limited actions to determine who has the right to possess property *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946). When the trial court determined Defendant paid no rent, the trial court appropriately determined the landlord had the right to possess property. Because the trial court did not err in its initial April 19, 2011, determination, the trial court could order Defendant to vacate the property in favor of Plaintiff provided Plaintiff was the owner of the property. In addition, the trial court could order that Defendant pay the requested back rent. Past due rent may be ordered in a forcible detainer action.

III. CONCLUSION.

Because the Defendant admitted she did not pay the rent and because Defendant failed to appropriately introduce evidence about any agreement that she not pay rent if the property went into foreclosure, this Court concludes the South Mountain Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the South Mountain Justice Court.

IT IS FURTHER ORDERED remanding this matter to the South Mountain Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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